IN THE

SUPREME COURT OF THE

UNITED STATES

Supreme Court, U. S.
FILED
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October Term, 1975

No. 75-4691

JOHN GREENYA, Petitioner

v.

GEORGE WASHINGTON UNIVERSITY, and
JOHN REESING, Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO
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The Petitioner herein, John Greenya, prays that a Writ of Certiorari issue to review the final order of judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 26, 1975, based upon the Opinion of that Court, decided and issued on May 2, 1975. The final judgment herein was entered on June 26, 1975, after denial of Petitioner's Petition for Rehearing and/or Suggestion for Rehearing En Banc.

OPINION BELOW

The Opinion of the Court of Appeals, decided May 2, 1975, in the form employed by it, is set forth in the Appendix (App. 1-9). That Opinion is now also reported at 512 F.2d 566.

JURISDICTION

The initial judgment and Opinion of the Court of Appeals was entered on May 2, 1975. After first rejecting an extension of time for the purpose, that Court later granted further time for the filing of a Petition for Rehearing and/or Suggestion for Rehearing En Banc; and after considering the timely-filed Petition and/or Suggestion, it denied both in its orders of June 26, 1975, as appear in the Appendix (App. 10-11). Its final order and judgment was entered that date. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether,(a) in general, violations of First Amendment rights by so called "private" bodies can be triggered as constitutional or Bivens claims and remedies because the violation arises in a circumstance related to that body's servicing of federal government personnel, or (b) in particular, whether, in a case of the admitted firing of a non-tenured college teacher solely for the exercise of free speech rights, the constitutional claims as made, and the federal rights and remedies asserted, are not triggered by the fact that the students taught by the teacher and the facilities used for his service, are all federal, even though the college contracting to provide the service is not state-owned; and if they are so triggered, was it not error to strike them

from consideration of the jury, particularly where it is conceded that the tenure and expectancy rights were otherwise legally sufficient and no hearing was held.

2. Whether, apart from the foregoing, the unique status of the District of Columbia or the special federal involvement at bar, by way of specific federal beneficiaries and federal facilities, or the special "public" function of large "private" universities, or all of them,do not create the necessary circumstances clearly sufficient to trigger federal remedies for a "private" college teacher possessed of legally sufficient expectancy claims, who is terminated from teaching at a federal facility in the District of Columbia because he wrote an article laudatory of a fellow teacher.

3. Whether the deprivation of a "§1983 claim" in this case,at least to the extent that it was either based on or required by District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, is not violative of equal protection rights, or is otherwise federally impermissible?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Title 42, U.S. Code, Sec. 1983.

STATEMENT OF THE CASE

This appeal began with a Complaint by the Petitioner, Mr. Greenya, against the Respondents, George Washington University and one of its administration professors, Mr. Reesing. The suit, filed in 1971, alleged "federal jurisdiction under the United States Constitution and under the Civil Rights Acts" and claimed damages "for wrongful and illegal termination of employment, breach of contract, violation of civil rights and other relief" (JA 4-5; 18).

At the trial in the Federal District Court the following was established; that Mr. Greenya, the Petitioner here, was a full time English teacher with George Washington University on its campus in the District of Columbia for four years --- from 1964 through 1968; that he thereafter became a part-time, off-campus instructor supplied by George Washington University to the Navy, specifically teaching Navy personnel at the Naval School of Hospital Administration, in English subjects (English, English Composition, Report Writing); that his teaching of such Naval personnel took place at those Naval facilities in Bethesda, Maryland, pursuant to an agreement between the Navy and George Washington University to supply such a service for it and its personnel at those facilities; that Mr. Greenya had an agreement or understanding, by custom and practice or commitment, of permanent, part-time employment, providing for his teaching of Naval personnel at the Naval Hospital on a part-time basis, while at the same time he would be pursuing certain other activities such as a free lance writer; that solely and concededly because he wrote what he considered to be a highly laudatory article about a fellow teacher (and implicitly perhaps about how "teaching" teachers do not receive proper recognition by doctorate-oriented

college administrators) he was terminated, without any notice or hearing of any kind; that those actions were taken and carried out by George Washington University, through the defendant/respondent John Reesing, then in charge of the off-campus program; and as a result he suffered loss.

Mr. Greenya's suit alleged that these acts did in fact "violate and disregard the constitutional (rights) granted him as a citizen of the United States, causing him to suffer substantial loss to his person and professional reputation" (JA . 7); and that the acts and statements of the University were undertaken "to punish plaintiff for the simple exercise of constitutional and civil rights" (JA. 9).

Throughout the Complaint, noted in Pre-trial Order and appearing in claims and instructions denied at the trial, the federal remedy and constitutional bases of the claims were asserted. The trial Court struck all constitutional and federal-right remedies. His claims are not only set forth in the foregoing, but can be observed in the denied instructions as well as the issues presented and set forth in the Appendix (App. 12 - 18).

In fact, the case went to the jury on a simple breach of contract theory. With the basic indication from all it heard that George Washington University could most assuredly terminate Mr. Greenya for the writing of the article (the Court refusing the Petitioner's instructions that it could not do so), and the constitutional and "Bivens" claims stricken; and further, even the claim of wrongful denial of a hearing also struck, it comes as no surprise that with practically an instructed verdict for the defendants, the jury did find for them.

In his appeal, Mr. Greenya emphasized the following: as he noted in his main brief and re-emphasized in his reply brief when he discussed the various authorities cited by respondents and referred to in the Opinion below, "the crucial facts (which distinguish this case) are the two vital facts that Mr. Greenya taught at the Naval Hospital and he taught Naval personnel" (Reply Brief, p.3, emphasis in original). He urged below and underscored that in all cases cited by defendants, there was no service at government facilities nor any teaching of government personnel e.g., in Wahba v. New York University, 492 F.2d 96. (Reply Brief, p.4).

He likewise raised the special circumstance of the District of Columbia,relying on Greene v. Howard University, 134 U.S. App.D.C. 81, 412 F.2d 1128; Edwards v. Habib, 130 U.S. App.D.C., 126, 397 F.2d 687, and the "federal questions that are especially involved in universities at the seat of government" (Reply Brief, p.5 and see Petition for Rehearing, p.3,6); he underscored below his theory that "the conflicting issue of federal-state relations . . . is not the same in the District of Columbia, as it is in any other jurisdiction (Reply Brief, p.6); he stressed the unique status of the District of Columbia, noted, in the District of Columbia v. Carter, supra as it relates to the issues here (Brief, p.53 , Petition for Rehearing, pp. 5,8) and, of course, he made it undisputably clear in argument and indeed two briefs that his rights directly rested on Bivens v. Six Unknown Named Agents of the FBN, 403 U.S. 388, 390, 91 S.Ct. 1999. Indeed, he specifically concluded his Reply Brief with Bivens at the heart of this pressed point. After reviewing the cases cited and observing that, as to those cases, "we are not dealing with servicing government personnel at government facilities ...." (Reply Brief, p.7), he then concluded the entire Reply Brief with these words, urged below: "Mr. Greenya's rights were assertable under Bivens. See Bivens v. Six

Unknown Agents, 403 U.S. 388, 390, 91 S.Ct. 1999. See Sullivan v. Murphy, supra [Sullivan v. Murphy, 156 U.S. App.D.C. 28, 478 F.2d 938]. And this Court must and should so rule". (Reply Brief, p.8, re-emphasized Petition for Rehearing, p. 11).

We, obviously, mention these claims and positions, all duly appearing in instructions, briefs and positions below, because there is some indication, in isolated portions of footnotes in the Opinion below, that certain issues might not have been raised. Fortunately, a careful reading of the Opinion and its response to the issues suggests precisely the indisputable fact that all of the positions this Petitioner is presenting for consideration here were clearly presented below. See Briefs, Petition and App.12-18. Our points were wrongly rested on unanalyzed labels affecting important rights of the many, not only those asserting rights under Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694 and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant and Recurring Problems Regarding the Criteria for the Availability of Constitutionally-Based Federal Remedies for Those Who Have Suffered from the Exercise of Free Speech Rights; and Further, Because of its Factual Pattern, it Affords this Court the Opportunity to Draw Meaningful Criteria on this Issue as well as Address Itself to the Significant Question Whether the Federal Government Can Contract Away its Involvement in Relations with "Private" Organizations, to Such a Degree That One Otherwise Unconstitutionally Damaged, Cannot Complain.

As the Opinion below recognizes, although with far less emphasis than the record justifies, there is no dispute that there was a firing at bar, solely for the exercise of free speech rights.

In spite of that fact, of course, if that were all that we could present to this Court, its energies would probably have to be directed to another case.

What makes this case significant is that no recent decision which we have seen, has had so much federal involvement in it, and still drawn the line at denying constitutional and federal claims. Not Wahba, in the Second Circuit, not Spark in the District of Columbia, not the implications of Moose Lodge or Jackson, in this Court; not any of these appear to have gone so far as the decision at bar. See Wahba v. New York University, 492 F.2d 96 (2nd Cir.) cert.den. ____U.S. ____, 95 S.Ct. 135; Spark v. Catholic University, ____U.S. App.D.C. ____, 510 F.2d 1277; Jackson v. Metropolitan Edison, ____U.S. ____, 95 S.Ct. 449; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965. See also, Jackson v. Statler Foundation, 496 F.2d 623 (2nd Cir.); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856,860; McQueen v. Druker, 438 F.2d 781 (1st Cir.).

The Opinion below suggests finally that "the mere receipt of government loans or funding is not sufficient involvement to trigger constitutional guarantees in the University's relation with its employees" (App. 6-7, 512 F.2d at 561).

We say that this decision has misread Moose Lodge and Jackson, supra, and the other decisions it cites, by extending them beyond what they will factually bear, or they intend in a Perry-Roth context.

We say that at the very least the issue is not control but function or benefit. We say, in spite of mere words used in other contexts, precisely what we said in our Petition below: "(This) Court must make clear that employees working for so called 'private' entities doing the federal government's job for its own federal employees at its own federal facilities do not lose their federally-impacted rights and remedies because the federal government has a contract that turns over day-to-day control to the entity: . . . . (and) when the federal government makes contracts with bodies that claim to be private, to perform its own function - - - - e.g., as here, (to) teach its employees at its facilities - - - - the issue of federal involvement is not and cannot turn on 'control' (or that which is contracted for) but rather must look to the function or job performed (that which is being done). Here, ... the panel palpably ignored the function or job - - - - teaching Navy personnel at Naval facilities. That is 'government function'. It triggers the remedies here" (Pet. for Reh. p.4; Rep.Br. 5-8).

We said that below. Indeed, we pointed out that in most other instances, the law does not permit parties to contract away their duties. They may delegate, but they remain responsible. And so, the District of Columbia has held. See Whetzel v. Jess Fisher Management Co., 108 U.S. App.D.C. 385, 282 F.2d 943; Garfinckel v. Firemen's Insurance (D.C. App.) 288 A.2d 662.

The idea that the federal government, however, can contract away responsibility for what others cannot, is most assuredly odd, particularly where the matter involves incursion into federally and constitutionally-based rights.

We say that that issue alone is of sufficient significance or breadth of application - - - - applying as it does to all federally-contracted-out situations - - - - to warrant granting the writ here.

Of course, we assume it ought to require no special emphasis in this Petition to make clear that the right claimed was finally established in Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694; cf. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701; see, for the special concern of the Courts that academic freedoms not be impaired, Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731. And see also, Greene v. Howard, supra, and Guillory v. Administrators, 203 F.Supp. 855; Moore v. Gaston County Board of Education, 357 F.Supp 1037, and Winston v. Board of Education, 309 A.2d 89. See Belk v. Chancellor, 336 F.Supp. 45 (E.D. Mo. 1970).

So too, it takes no emphasis, and this Court is all too aware of the fact, that basically this cause involves Perry-Roth assertions in the context of large colleges that claim to ber "private". The issue is whether there are federal remedies at all, in that or an analogous circumstance.

Finally, of course, as our complaint, instructions, questions presented, and argument below all show, it was urged again and again that since it was conceded that there was no hearing to Mr. Greenya, Board of Regents v. Roth, required reversal. (Brief with JA. ref, pp. 2,25,26,30,36, 48, Inst. 7 and 14, App. 13,16). The Court of Appeals' Opinion accepted the fact that, although non-tenured, Mr. Greenya had established sufficient evidence of an expectancy to meet the hearing requirements of Board of Regents v. Roth (Opinion, App. 3-4).

In sum, whether treated generally as problems of remedies for First Amendment violations by "private bodies" directly servicing the government or in a Perry-Roth context, we assert that those rights are not so puny and the federal involvement not so insignificant that absence of day-to-day federal control prevents the triggering of federal remedies. More,in this context,should be visited upon George Washington University than a "Mom and Pop" grocery store in Wichita Kansas.

II. Whether Viewed Together or Separately, the Issues of the Unique Status of the District of Columbia, the Public Function of the University and the Denial of Equal Protection at Bar are of Such Significant and Recurring Nature in This Context, and so Overlooked Below, That They Warrant Grant of the Writ.

It is not inappropriate to observe that the Opinion below is based upon a factual circumstance that has more federal factors in it than any First Amendment-deprivation case we believe could be cited as support for the denial of relief. None has gone this far. In that sense, the Opinion below is contrary to the intent and promises of Burton v. Wilmington Authority, supra, Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, and it is even in conflict with the premises of the Second Circuit decision in Jackson v. Statler Foundation, 496 F.2d 623 cert.den. 95 S.Ct. 1124.

Moreover, it really fails to deal with the "unique status" of this special jurisdiction, carefully noted in District of Columbia v. Carter, supra, 93 S.Ct. at 608-610: If we consider some cases cited below such as Belk, Greene and Edwards, relied upon to emphasize the special problems of the academic community; if we but recognize the "public function" points and special academic context of our facts also urged below; if we do this, and if either separately or together, we add in Carter, one has a right to observe this: The problems of federalism are not the same in the District of Columbia as elsewhere; the District of Columbia is not Kansas for federalism and federal remedies purposes; even tests of "state action" by local authorities are different. Furthermore, higher eduction itself does have a non-commercial "public function," noted in our denied instructions, which, when the size and impact is enough, makes the demand for "state action" in the strict sense, a label without content. The standards by which federal remedies are triggered ought to be somewhat different in that situation than any other. See Pickering-Perry-Roth; see Belk, Greene, supra.

Finally, we add this: The District of Columbia had expressed its inclination as to what local factors would trigger court remedies for "private" conduct infringing on constitutional rights in its Greene and Edwards decision; this jurisdiction particularly has a right to say for itself what is the degree or kind of action or standards (local charter, tax exemption, local support, public function, the Greene and Belk-like points) that are necessary to bring about "state (i.e., local District of Columbia) action". It should be able to do so, especially in the college context, without regard to direct federal involvement of the kind also at bar. We read District of Columbia v. Carter to allow this action as a Bivens-type claim (if we establish the federal but not the local "state" involvement) and deny it as a 1983 claim. It is ironic in the extreme, if this be so, that in this manner, a person (even a non-resident as was Mr. Greenya asserting diversity jurisdiction) who has been deprived of constitutionally-based or constitutional claims in the District of Columbia has the worst of both worlds, simply because the event happened in this unique jurisdiction. One would have thought that, if anything, and because of its lesser state-federal conflicts and its greater federally-impacted interests, that a person would be better protected from unconstitutional wrongs if imposed here. Instead, the rules of "state action" applicable to other states are incorporated from elsewhere. Section 1983 is said not to apply. And so, the unconstitutionally-injured in the District of Columbia is more disadvantaged than elsewhere. Other jurisdictions can set standards of "state action" for themselves sufficient to trigger Section 1983 (e.g., Greene, Belk, standards or those in Isaacs v. Board of Trustees, 385 F.Supp. 473, ED.Pa. 1974). But those suffering unconstitutional deprivations in the District, in effect, cannot do so because there is no 1983 to trigger here. That is what we called, below,

the denial of equal protection. In this regard, we noted that the "local" law of the District of Columbia expressed in Edwards v. Habib, supra, refused to permit its Courts to be used to override constitutional claims even if the wrongdoer was private (there, a landlord). That was and is the local law. See MAP v. Ryan, (D.C. Ct.App.) 285 A.2d 310. (So too is Greene, of course). All Greenya involves is the reverse of Edwards, with the wrongdoer being sued instead of, perhaps, itself seeking affirmative relief.

Evidently, the Circuit Court thought the District cannot set for itself such standards, and further, that it is not unique. We disagree.

Finally, the Opinion suggests splits among the Circuits on the "public function" issue and the extent of Bivens in a First Amendment context.

We agree; and that is all the more justification for the grant of this Petition.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion in this cause rendered by United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

John R. GREENYA, Appellant,

v.

GEORGE WASHINGTON UNIVERSITY et al.

No. 73-2056.

United States Court of Appeals, District of Columbia Circuit.

Argued 16 Jan. 1975.

Decided 2 May 1975.

Part-time instructor whose employment was terminated brought action against university and chairman of the department seeking damages for violation of his civil rights, defamation, wrongful termination, and breach of contract. The United States District Court for the District of Columbia, John Lewis Smith, Jr., J., granted directed verdict on constitutionally based claims and on claims relating to defamation, and entered judgment on jury verdict for defendant on remaining claims, and plaintiff appealed. The Court of Appeals, Wilkey, Circuit Judge, held that the private university in question was not a governmental entity for constitutional purposes by reason of governmental charter, tax exemption, or receipt of federal funds, nor by reason of fact that plaintiff had been teaching government employees at government facility; that plaintiff could not recover damages under civil rights statute on ground that the university was acting under color of federal law; that plaintiff could not recover for defamation on the basis of presence in university office of index card bearing statement "Do not staff"; and that there was no abuse of discretion in excluding certain evidence.

Affirmed.

1. Constitutional Law ⇐254

Private university was not a governmental entity for constitutional purposes, so as to trigger application of First Amendment and procedural due process guarantees in connection with termination of employment of part-time instructor on alleged ground that his writings had displeased chairman of the department, though university had received a corporate charter from appropriate governmental chartering authority, was exempt from taxation under federal and

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local law, and received federal funding for certain of its programs and capital expenditures. U.S.C.A.Const. Amends. 1, 5; 42 U.S.C.A. § 1983.

2. Constitutional Law ⇐254

With the possible exception of racial discrimination by recipients of government funding, mere financial support for particular projects represents insufficient government involvement to trigger First and Fifth Amendment constitutional guarantees for those dealing with the recipient. U.S.C.A.Const. Amends. 1, 5.

3. Constitutional Law ⇐254

Mere receipt of government loans or funding by an otherwise private university is not sufficient involvement to trigger First and Fifth Amendment constitutional guarantees in the university's relations with its employees. U.S.C.A. Const. Amends. 1, 5.

4. Constitutional Law ⇐254

Higher education does not constitute "state action" so as to trigger First and Fifth Amendment constitutional guarantees in university's relations with its employees on theory that such education is a public function. U.S.C.A.Const. Amends. 1, 5.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐254

Part-time instructor whose employment was terminated could have no claims for relief against university or its employees arising under the First Amendment or procedural due process guarantees of the Fifth Amendment on ground that he was employed to teach government employees at government facilities, where he was always under the supervision and control of university officials and maintained no contractual relations with the government, but was merely an employee of an independent contractor providing educational services to the Navy, and where the Navy had nothing to do with employer university's failure to renew instructor's contract. U.S.C.A.Const. Amends. 1, 5.

6. Civil Rights ⇐13.4(1)

University instructor whose employment was terminated could not recover damages against university under civil rights statute on theory that it was acting under color of federal law. 42 U.S. C.A. § 1983.

7. Civil Rights ⇐13.3(1)

If the constitution creates a right, privilege or immunity, it of necessity gives the proper party a claim for equitable relief if he can prevail on the merits, but it does not automatically create an action for money damages for all deprivations of constitutional rights.

8. Libel and Slander ⇐45(1)

Officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members if the matter communicated is pertinent to the functioning of the educational institution, and such privilege extends to internal records in which such matters are discussed or recorded.

9. Libel and Slander ⇐101(4)

For a plaintiff in a defamation action to overcome privilege of officers and faculty members of educational organizations to discuss qualifications and character of fellow officers and faculty members, he must prove that a publication occurred outside normal channels, that the normal manner of handling such information resulted in unreasonable degree of publication in light of the purposes of the privilege, or that the publication was made with malicious intent.

10. Libel and Slander ⇐10(6)

University instructor whose employment was terminated could not recover against university for defamation by reason of existence in university office of index card made at direction of the head of department and stating "Do not staff," despite contention that phrase carried an innuendo of either incompetence or dishonesty.

11. Libel and Slander ⇐103

In action brought against university by instructor whose employment had been terminated, trial court did not abuse its discretion in excluding documents consisting of 79 finely printed pages on ground that it was irrelevant because it was published two years after the events involved in the litigation and because the policies contained in that document had never been adopted by the university nor incorporated into its contractual relations with its employees.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action 1744–71).

Edward L. Genn, Washington, D. C., with whom Herbert L. Karp, Washington, D. C., was on the brief for appellant.

Donald L. Ivers, Washington, D. C., with whom Denver H. Graham, Washington, D. C., was on the brief for appellee, George Washington University, also argued for appellee Reesing.

Thomas D. Quinn, Jr., Washington, D. C., was on the brief for appellee John Reesing, Jr.

Before MacKINNON and WILKEY, Circuit Judges, and VAN PELT,* United States Senior District Judge for the District of Nebraska.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

This case arises out of the termination of appellant's employment as a part-time, off-campus instructor with the College of General Studies of The George Washington University. During his last academic year, appellant taught one English course each semester at the United States Naval School of Hospital Administration, Bethesda, Maryland, where his students were mainly naval officers and other persons attached to the School. The University provided these courses to the Navy under contract and the University, in turn, arranged for an instructor. Appellant's complaint claimed a violation of his civil rights and common law claims of defamation, wrongful termination, and breach of contract by George Washington University and John Reesing, Jr., the Chairman of the English Department. At trial the court granted defendants' motion for a directed verdict on the constitutionally-based claims for relief and on the claims relating to defamation. The issues relating to wrongful termination and breach of contract went to the jury, who found for defendants. We affirm.

I. *Constitutionally-Based Claims*

Initially we must determine whether the District Court was in error when it determined (after considering appellant's evidence at trial) that appellant had failed as a matter of law to present any constitutionally-based claims for relief. Appellant had alleged that he had been fired because one or more articles he had written and had published aroused the displeasure of defendant Reesing. It is contended that as a result Reesing failed

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

to renew appellant's contract, a contract which would otherwise have been routinely renewed. Although defendants contest both these allegations, the District Court did consider appellant's contractual claims sufficiently substantial to permit them to go to the jury. Therefore, in ruling on the constitutional claims, we must also assume that appellant would have prevailed sufficiently on these allegations to permit them to go before the jury. In addition, both sides concede that appellant was granted no procedural rights whatsoever in connection with the non-renewal of his contract.

The District Court's grant of a directed verdict for defendants is based on two grounds: First, after listening to the evidence, it determined that there was a lack of sufficient governmental involvement in appellant's employment relationship or termination to trigger application of First or Fifth Amendment guarantees. Second, even if there had been sufficient governmental involvement, the Civil Rights Statute, 42 U.S.C. § 1983, failed to give appellant a claim for monetary relief, because it was inapplicable by its terms to actions undertaken "under color" of federal law or custom. As will be discussed in more detail below, we find the District Court was correct on both these grounds.

A. *State Action*

All analysis of constitutional rights must begin with a recognition that the Constitution, with rare exceptions,[1] is a declaration of the powers, duties, and limitations of the Federal Government and of the States. Although government has broad power to prohibit actions undertaken by private individuals, the Constitution *proprio vigore* only places limitations on actions undertaken by governmental entities. Simple though the distinction may seem between that which is public and that which is private, and although much has been written on the topic,[2] the increasing number of teacher dismissal cases reaching the federal courts from private universities indicates that some discussion of the relevant constitutional issues is in order.[3]

[1] George Washington University, like nearly all private institutions of higher learning, received a corporate charter from the appropriate governmental chartering authority, is exempt from taxation under federal and local law because it is an educational institution, and receives federal funding for certain of its programs and capital expenditures. We have no difficulty deciding that the first two factors do not constitute sufficient governmental involvement in the University to make it a

1. The Thirteenth Amendment, for example, is not merely a prohibition of laws establishing or upholding slavery, "but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Civil Rights Cases, 109 U.S. 3, 20, 3 S.Ct. 18, 28, 27 L.Ed. 835 (1883); Jones v. Mayer Co., 392 U.S. 409, 438, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

2. *See, e. g.*, Burke & Reber, State Action, Congressional Power, and Creditor's Rights: An Essay on the Fourteenth Amendment, 46 S.Cal.L.Rev. 1003 (1973); Friendly, The Dartmouth College Case and the Public-Private Penumbra, 12 Texas L.Q. (2nd Supp.) 141 (1969); Williams, The Twilight of State Action, 41 Texas L.Rev. 347 (1963); Lewis, The Meaning of State Action, 60 Colum.L.Rev. 1083 (1960); Note, 43 Ford.L.Rev. 388 (1974); and Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum.L.Rev. 656 (1974).

3. *See, e. g.*, our recent opinion in Spark v. The Catholic University, slip page 164, 166 U.S.App.D.C. —, 510 F.2d 1277 (1975), and cases cited in notes 4 and 6.

governmental entity for constitutional purposes.[4] The granting of a corporate charter is ministerial governmental action and does not involve the Government to any significant degree in either the management or the promotion of a chartered corporation. Similarly, granting tax-exempt status to a class of organizations such as institutions of higher learning, although it tends to foster support for organizations so exempted, does not involve Government in the management of such organizations or in the promotion of particular exempted organizations within the class. Even in the more rigid context of the Establishment Clause mere tax exemption of religious organizations has consistently been found not to breach the separation of church and state.[5]

[2] Looking to the third factor, however, we find some cases that have held that significant government funding constitutes sufficient state involvement in the activities of the recipient to trigger constitutional guarantees for those dealing with the recipient. With rare exception these cases have dealt with racial discrimination practiced by recipients of government funds.[6] "It is argua-

4. No "state action" results from the grant of a tax exemption: Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

No "state action" results from the grant of a corporate charter: Trustees of Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 518, 635–39, 4 L.Ed. 629; Blackburn v. Fisk University, 443 F.2d 121 (6 Cir. 1971).

"State action" has been found on the basis of a tax exemption where allegations of racial discrimination were being made: Jackson v. Statler Foundation, 496 F.2d 623 (2nd Cir. 1974) (if substantially dependent on tax exemption); Falkenstein v. Dept. of Revenue, 350 F.Supp. 887 (D.Or.1972) (three-judge court), appeal dismissed, 409 U.S. 1099, 93 S.Ct. 907, 34 L.Ed.2d 681 (1973). *See also* Green v. Connally, 330 F.Supp. 1150 (D.D.C. 1971) (three-judge court), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971); McGlotten v. Connally, 338 F.Supp. 448 (D.D.C.1972) (three-judge court).

5. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

6. Under circumstances in which there was neither substantial governmental control nor allegations of racial discrimination, the following cases can fairly be read as holding that government funding is insufficient to transform a private organization into a governmental instrumentality: Wahba v. New York University, 492 F.2d 96 (2nd Cir.), cert. denied, — U.S. —, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974), cert. denied, — U.S. —, 95 S.Ct. 505, 42 L.Ed.2d 301 (1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1973) (student expulsion); Weigand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973) (non-renewal of tenant's lease; direct funding and reduction in state real estate taxes); Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2nd Cir. 1970), cert. denied, 401 U.S. 994, 91 S.Ct. 1238, 28 L.Ed.2d 532 (non-renewal of tenant's lease; housing project receiving federal mortgage insurance); Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968) (students not in publicly supported ceramics college); Grossner v. Trustees of Columbia University, 287 F.Supp. 535 (S.D.N.Y.1968).

"State action" was found in the following cases—all except the first are in the context of racial discrimination: McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (non-racial; tenant whose lease was not renewed makes procedural due process and First Amendment arguments; landlord had received very substantial governmental financial assistance); Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (racial discrimination); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721, 66 S.Ct. 26, 90 L.Ed. 427 (1945) (racial discrimination); *cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

ble . . . that racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts . . . ."[7] With the possible exception of racial discrimination by recipients of government funding, we believe that mere financial support for particular projects also represents insufficient government involvement.

In most respects such financial support can be viewed the same as a tax exemption. Such support is generally provided to a large class of qualified organizations and does not involve government in the actual management of the funded program. It might be argued that a tax exemption is distinguishable because it merely provides a vehicle for private funding, while government grants, loans, or loan guarantees represent direct governmental support.[8] The reality is that while a direct grant represents a matching fund arrangement between government and recipient, a tax exemption is a matching fund arrangement entered into between government and the recipient's contributors. Although the conditions attached to direct grants, loans, or loan guarantees might be somewhat more detailed and exacting than those for tax exempt status, the distinction does not become significant until the conditions become so all pervasive that the Government has become, in effect, a joint venturer in the recipient's enterprise.[9]

[3, 4] Our conclusions are predicated on the absence of any showing before the District Court that the Federal or District of Columbia Government has exercised any role in the management of George Washington University or has adopted a pervasive scheme of statutes, codes, and conditions which has the effect of regulating in detail the University's management. While the determination of how much governmental involvement is necessary before a private institution is subject to constitutional limitations must be made on a case by case basis, we are clear that the mere receipt of government loans or funding by an otherwise private university is not sufficient involvement to trigger constitution-

7. Coleman v. Wagner College, 429 F.2d 1120, 1127 (2nd Cir. 1970) (Friendly, J., concurring).

8. Lewis, The Meaning of State Action, 60 Colum.L.Rev. 1083, 1108 (1960). *Contra*, Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum.L.Rev. 656, 675–77 (1974).

9. In the context of racial discrimination by a private club licensed to serve liquor by the Pennsylvania Liquor Control Board, the Supreme Court stated:

> The District Court was at pains to point out in its opinion what it considered to be the "pervasive" nature of the regulation of private clubs by the Pennsylvania Liquor Control Board. As that court noted, an applicant for a club license must make such physical alterations in its premises as the board may require, must file a list of the names and addresses of its members and employees, and must keep extensive financial records. The board is granted the right to inspect the licensed premises at any time when patrons, guests, or members are present.
>
> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

al guarantees in the University's relations with its employees.[10]

[5] Realizing that the above three factors would probably prove insufficient, appellant has sought to augment his case by emphasizing that he was employed to teach government employees at government facilities. This is of no importance in light of the evidence that he was always under the supervision and control of University officials, and that he maintained no contractual relations with the Navy. Nothing in the record indicates that the Navy had any right to say who would be hired to teach the English courses. Neither does the record indicate that the Navy had anything whatsoever to do with the failure to renew appellant's contract. Appellant was merely the employee of an independent contractor who was providing educational services to the Navy.

George Washington University must, in the present case, be viewed as a private institution. Absent a nexus between appellant's termination by the University and the Navy, appellant can have no claims for relief against the University or its employees arising under the First Amendment or the procedural due process guarantees of the Fifth Amendment.

B. *Jurisdiction under the Civil Rights Statute*

Appellant insists that notwithstanding the Supreme Court's opinion in District of Columbia v. Carter[11] he ought to be able to present constitutionally-based claims for monetary relief. He appears to be under the misapprehension that the District Court was deciding that the Civil Rights Statute, 42 U.S.C. § 1983, was inapplicable *within* the District of Columbia and therefore he has argued that an equal protection problem lurks in the statute.

[6, 7] *Carter* holds that section 1983 is inapplicable to actions *against* the District of Columbia, because the District was neither a "State" nor a "Territory" within the meaning of the statute, which provides a claim for equitable or legal relief to any person who has been denied constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . ." This case is definitely not an action against an organization acting under color of state or territorial law. The District Court's reference to *Carter* was

10. Looking again to the Establishment Clause context, we find, for example, that government funding for building projects at institutions sponsored by religious institutions to be used for secular purposes has been held not to constitute significant governmental involvement with religion and thus was not prohibited by the First Amendment. Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (colleges and universities); Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899) (hospital).

Although appellant has not raised the argument, we have considered whether higher education constitutes "state action" because it is a "public function" as that term has been developed since Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), and have concluded that it is not. We agree with the Second Circuit's conclusion that education, even at the primary or secondary levels, has never been a state monopoly in the United States. As a historical matter, the wide-scale private development of higher education in this country preceded state entry into the field by more than a century. Powe v. Miles, 407 F.2d 73, 79-80 (2nd Cir. 1968), reaffirmed, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1973). *Contra*, Developments in the Law-Academic Freedom, 81 Harv.L. Rev. 1045, 1060-61 (1968).

11. 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

by way of underscoring the fact that if section 1983 was inapplicable to the District, it was certainly inapplicable to an organization such as George Washington University which is argued to be acting under color of federal law.[12]

We do not suggest that one is without any remedy if an organization acting under color of federal law is depriving a person of his constitutional rights. We only hold that plaintiff has no claim arising under the Civil Rights Statute and that if a claim for damages against a federal instrumentality exists at all it must be created by the Constitution itself.[13]

12. The cases holding that section 1983 is inapplicable to persons acting under color of federal law are legion. *See, e. g.*, Wheeldin v. Wheeler, 373 U.S. 647, 652, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 398 n. 1, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring); Long v. Parker, 390 F.2d 816, 819 (3rd Cir. 1968); Norton v. McShane, 332 F.2d 855, 862 (5th Cir. 1964), cert. denied, 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274 (1965); Jones v. Perrigan, 459 F.2d 81, 83 (6th Cir. 1972); Williams v. Rogers, 449 F.2d 513, 517 (8th Cir. 1971), cert. denied, 405 U.S. 926, 92 S.Ct. 976, 30 L.Ed.2d 799 (1972).

13. If the Constitution creates a right, privilege, or immunity, it of necessity gives the proper party a claim for equitable relief if he can prevail on the merits. Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946). However, the Constitution, unlike section 1983, does not automatically create an action for money damages for all deprivations of constitutional rights. The Supreme Court has found that an action does lie for violations of the Fourth Amendment. Bivens v. Six Unknown Federal Narcotics Agents, *supra*. On the other hand, the lower federal courts have split over whether violations of the First Amendment or the due process guarantees of the Fifth Amendment also give rise to actions for money damages. Cases finding a cause of action: States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974) (Fifth Amendment rights); United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3rd Cir. 1972) (dictum; Fifth Amendment right to a fair trial); Bethea v. Reid, 445 F.2d 1163 (3rd Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (1972) (held that a complaint alleging violation of Fourth *and* Fifth Amendment rights stated a claim for relief); Gardels v. Murphy, 377 F.Supp. 1389, 1398 (N.D.Ill.1974) (First Amendment rights); Butler v. United States, 365 F.Supp. 1035 (D.Hawaii 1973) (First Amendment rights); Johnson v. Alldredge, 349 F.Supp. 1230 (M.D.Pa.1972), affirmed in part, reversed in part on another issue, 488 F.2d 820 (3rd Cir. 1973) (access by prisoner to the federal courts); *see also* James v. United States, 358 F.Supp. 1381 (D.R.I.1973) (dicta; favors expansive reading of *Bivens*); Washington v. Brantley, 352 F.Supp. 559, 564 (C.D.Fla.1972) (assumes *arguendo* that *Bivens* recognizes a cause of action for violation of all constitutionally protected interests).

Contra, Archuleta v. Callaway, 385 F.Supp. 384, 388 (D.C.Colo.1974); Moore v. Schlesinger, 384 F.Supp. 163 (D.C.Colo.1974) (First Amendment); Smothers v. Columbia Broadcasting System, Inc., 351 F.Supp. 622, 626 (C.D.Cal.1972) (First Amendment); Davidson v. Kane, 337 F.Supp. 922, 924 (E.D.Va.1972) (limited *Bivens* to cases arising under the Fourth Amendment). The question has been left open by this court and by the Second Circuit. Cardinale v. Washington Technical Institute, 163 U.S.App.D.C. 123, 128, 500 F.2d 791, 796 n. 5; Wahba v. New York University, *supra*, 492 F.2d at 103 04. Even if it were decided that federal officers can be sued for damages for violations of the First and Fifth Amendments, such a decision would not automatically sweep within its ambit a case such as this one where private parties and not federal officers are allegedly acting under color of federal law or custom. Fletcher v. Rhode Island Hosp. Trust Nat. Bank, 496 F.2d 927, 932 n. 8 (1st Cir. 1974). Because we find no state involvement and because the issue was not raised before this court or the District Court, we do not feel compelled to reach these issues. Citizens for Allegan County, Inc. v. FPC, 134 U.S.App.D.C. 229, 239, 414 F.2d 1125, 1135 (1969).

II. *The Common Law Claims*

The District Court directed a verdict for appellees on the issues of defamation and punitive damages. The alleged defamatory statement was an entry on a 3 x 5 index card in the Office of Academic Staffing made at the direction of Reesing stating, "Do not staff." Appellant contends that the phrase carries an innuendo of either incompetence or dishonesty. Although appellees contest the assertion that the statement was in any sense defamatory and argue that Greenya was not damaged, their basic contention is that there was no publication.

[8–10] It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution.[14] Concomitantly we believe the privilege extends to internal records in which such matters are discussed or recorded. For a plaintiff to overcome the privilege he must prove that a publication occurred outside normal channels or that the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege or that publication was made with malicious intent.[15] Since no evidence was introduced tending to overcome the qualified privilege, a directed verdict was proper as to defamation and punitive damages.

[11] Appellant also complains of a ruling at trial striking as irrelevant Plaintiff's Exhibit No. 3, the *A.A.U.P.* [American Association of University Professors] *Policy Documents and Reports* (1971 Edition), a document containing seventy-nine finely printed pages. The court found the exhibit to be irrelevant because it was published some two years after the events involved in the litigation and because the policies contained in the document had never been adopted by the University and thus had not been incorporated into the University's contractual relations with its employees. The trial court acted well within its discretion on this evidentiary matter.

Appellant has contested the jury instructions on numerous grounds. We have examined those instructions and have found no reversible error.

Affirmed.

14. Prosser, Law of Torts § 115 (4th ed. 1971), p. 791; *see also* Blake v. Trainer, 79 U.S.App. D.C. 360, 148 F.2d 10 (1945).

15. Prosser, *supra*; Blake v. Trainer, *supra*; *see also* Hunt v. Calacino, 114 F.Supp. 254 (D.D.C.1953).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2056 **September Term, 19** 74

Civil Action 1744-71

John R. Greenya,
Appellant

v.

George Washington University, et al

United States Court of Appeals
JUN 26 1975
HUGH E. KLINE

O R D E R

Appellant's suggestion for rehearing en banc having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court en banc that appellant's aforesaid suggestion for rehearing en banc is denied.

For the Court:

HUGH E. KLINE
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2056

September Term, 19 74

Civil Action 1744-71

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 26 1975
HUGH E. KLINE
CLERK

John R. Greenya,
Appellant

v.

George Washington University, et al

Before: MacKinnon and Wilkey, Circuit Judges; Van Pelt*, Senior District Judge for the District of Nebraska.

O R D E R

On consideration appellant's petition for rehearing and/or modification of opinion and for stay of judgment and mandate, it is

ORDERED by the Court that appellant's aforesaid petitions are denied.

Per Curiam

For the Court:

Hugh E. Kline

HUGH E. KLINE
Clerk

App. 11

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1 *

The Court instructs the jury that the plaintiff in this case, John Greenya, is entitled, as a matter of law, to recover against the defendants.

The amount of that recovery, or the amount of your judgment, should be based on the instructions for damages which I will hereafter give.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5

You are instructed that in this case it is conceded that Mr. Greenya, the plaintiff, was terminated from further employment in his then existing position by these defendants. You are instructed that the reasons given by the defendants for their actions in this case are not constitutionally permissible, or not otherwise permissible reasons or justification under the law. In short, you are instructed that the termination of Mr. Greenya's service was unjustified as a matter of law. As a consequence, and because of that unjustified termination, Mr. Greenya is entitled to recover damages against the defendants in such sum, and in such amount, as you will determine, based upon the instructions which I will hereafter give.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6

No institution is immune from some criticism, and no employee may be prohibited from exercising reasonable free speech rights in connection with such institution, especially a university, as in this case. This is not to say that the article in this case were, or are, necessarily critical of George Washington University particularly. But, even if you find that they were, or are, the Court instructs you that in this case, that would not be sufficient ground in itself to justify or warrant the termination of Mr. Greenya's services.

* All were presented, argued and denied below, JA 94-116; 131-135.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7

You are instructed that, as a matter of law, that Mr. Greenya was entitled to a statement of the reason for his proposed termination and to a hearing of some kind. Since it is conceded he received neither, you are instructed that he is entitled to a judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8

You are instructed that there is evidence from practices or policies referred to in the exhibits in this case that a university should afford a hearing and other safeguards of notice and reasons for proposed termination to an instructor in the position of Mr. Greenya. If you find that these standards are existent in the academic community, or if you find that George Washington University has expressly adopted them, in fact or in practice, then on either ground, if you further find the defendants violated them, your verdict should be for Mr. Greenya.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

The Court instructs you that there have been testimony and exhibits admitted which reflect the acceptance, whether explicit or implicit, by George Washington University of the standards of the American Association of University Professors, sometimes called A.A.U.P.

If you find that the actions of the defendants violated the practices, principles, policies or standards of the A.A.U.P., then you are instructed that your verdict should be for the plaintiff, Mr. Greenya.

The reason for this rule is that even assuming an institution, such as George Washington University, is not necessarily required to adopt, accept, or put into practice certain specific standards, if it does, in fact, do so, and because many individuals seek employment at it because it does do so, and further, because those principles, policies and practices form a part of the understanding and rights of the individuals who are so employed, a violation of those standards, practices, principles and policies warrants an affected or offended person to claim a wrongful termination if that is the result.

In this case, it is for you to decide whether the termination of Mr. Greenya, in this instance, was wrongful; and whether there were violations of the standards, or practices, or policies, or principles adopted by, or followed by, George Washington University; and whether that violation resulted in the claimed wrongful damage.

You are instructed that a person employed at a position of the kind asserted by Mr. Greenya, may have an expectancy of employment for the reasonable future. If you find those are the facts, then you may consider that element as an element of damage in this case.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

You are instructed that any individual, even a teacher or instructor at an institution such as George Washington University, has a right of free speech which he does not lose because of his employment. While, in this case, the defendants did not prevent the publication of the article or articles by Mr. Greenya, there being no evidence they knew of them in advance, still they did use Mr. Greenya's exercise of his free speech rights as a basis for his termination, according to the plaintiff's evidence. If you find that it was because

he exercised his free speech rights in this regard that Mr. Greenya was terminated, then you are instructed that that was wrongful and improper, and that Mr. Greenya is entitled to a verdict in his favor.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12

You are instructed that the Court has examined the articles involved in this case, and instructs you that, as a matter of law, Mr. Greenya had a right to prepare and have those articles published without punishment from the defendants George Washington University or Professor Reesing. If, therefore, you find that the termination of Mr. Greenya's services as an off-campus instructor on a part-time basis was caused by his writing and having those articles, or either of them, published, then you are instructed that that termination was wrongful and warrants a judgment in Mr. Greenya's favor against the defendants.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13A

In weighing the arrangements between this plaintiff, Mr. Greenya, and the defendants, you are entitled to consider that contracts or arrangements of this kind "are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context. The employment arrangements here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs."

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

The Court instructs the jury that under the law of the District of Columbia, one who has had employment with an institution such as George Washington University, which is not a purely private business, and which is one affected with a public interest that extends beyond the District, is entitled to remain at his position and not be terminated for wholly unjustified reasons, without notice. In short, you are instructed that George Washington University did not have the absolute right to terminate Mr. Greenya's services in this case without valid reasons and upon reasonable notice.

STATEMENT OF ISSUES PRESENTED *

1. Whether or not, by way of its rulings as to the issue or by denying plaintiff Greenya's instructions on the point, the trial Court erred in holding that the plaintiff-appellant, Mr. Greenya, a university teacher paid by George Washington University while participating in an off-campus Navy-funded program, had no constitutionally protected free speech rights which he could exercise by publishing the article or articles involved in this cause without losing his position on that sole account.

2. Whether or not, in denying instructions on the point and its other rulings, the Court erred in ruling or holding that the plaintiff was not entitled to a hearing prior to the termination of his services in the part-time off-campus program, particularly where the alleged basis therefor involved matters of "academic freedom" and the First Amendment rights.

3. Whether or not, by its rulings and denial of instructions, the Court in effect deprived the plaintiff of his primary theories of the case, namely that, (1) more broadly, Mr. Greenya was entitled to publish the article here involved without severance of his university position at all, or (2) and more narrowly, he could not be punished for that conduct by termination of his services in this case where the article involved was not disruptive of the college, the program he taught was federally-funded and for federal employees, and where it was admitted that the sole basis of the termination was the article itself.

4. Whether the Court erred in striking from the jury's consideration of the case either the principles of law relating to, or the actual standards promulgated by

* These are taken from main Brief below without regard to Reply Brief.

the American Association of University Professors, both as to the fundamental right to publish the kind of articles here involved without punishment, and the right to a statement of reasons and hearing on the issues.

5. Whether because of standards in the profession, or because of the custom or policy of the University, the plaintiff was entitled to his instructions on the foregoing points.

6. Whether or not, because it was conceded that Mr. Greenya had been terminated from the off-campus, Navy-funded courses here involved solely because of an article he wrote (which was laudatory of a "teaching" professor), and it was further admitted that Mr. Greenya was never given a hearing, he was entitled, under all the evidence at the conclusion of the case, to a judgment in his favor on the constitutional claims.

7. Whether or not the Court erred in denying the plaintiff's other instructions, relating to (1) the important distinction between the non-commercial standards to be used in assessing "the breach" in this case as distinquished from usual commercial contracts, (2) the fact that the University is impacted with a public interest which affects the cause and issues, (3) the denial of the punitive damage claim, and, finally, (4) the denial of those portions of plaintiff's damage instructions as not given by the Court.

8. Whether in denying the application of the Civil Rights Act to these facts on the basis of District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, a Maryland resident, as was Mr. Greenya, is not deprived of constitutional rights and the equal protection of the laws for a wrongful violation occurring in the District of Columbia by a University here, unless there is a local common law liability analogous to that under Title 42, U.S.C., Sec. 1983, or the right is preserved under Sections 1981 or 1982.